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Family unity for migrant minors. Family reunification and European harmonization through the jurisprudence of the CJEU

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Abstract: This work seeks to make a concrete and precise analysis of the topic and policy of the family unity of migrant minors through the relevant European legislation up to Dublin III and in connection with the Directive on family reunification. There are many problems and perhaps we can say that the European legislator took concrete positions only on some points, the interpretation offered, however, by the Court of Justice of the European Union, was needed. The jurisprudential evolution of recent years is precise and very clear, placing once again at the forefront the protection of the minor who looks for a family unit. The time is ripe, the gaps still exist but the work in the sector still continues for the harmonization and protection of the rights of migrant children.

Keywords: European Union law, immigration, family reunification, European harmonisation, CJEU, best interests of the child, Dublin III, Brussels II ter, CFREU, family unity.

Introduction

The best interest for the child within the framework of the family unit is a topic always under discussion and constantly evolving both from a legislative and jurisprudential point of view. The protection of the minor is part of the protection of the right to family unity and especially when the minor is a migrant and his family is under the regime of seeking asylum. European jurisprudence and legislation in the sector is always broad, quite precise and evolving, especially in recent years.

We remember the sentence C-745/21 of 2022[1] and the A, S case of 2018[2] which enters into the scope of the right to family unity of migrant minors and asylum policy where the Court of Justice of the European Union (CJEU) focused on the importance of the sensitivity of the issue due to the vulnerability of the subjects

1CJEU, C-745/21, Staatssecretaris van Justitie en Veiligheid (Enfant à naître au moment de la demande d'asile) of 16 February 2023, ECLI:EU:C:2023:300, not yet published: "(…) Article 17, paragraph 1, of Regulation no. 604/2013 must be interpreted as meaning that: it does not preclude the legislation of a Member State from requiring the competent national authorities, for the sole reason relating to the best interests of the minor, to examine an application for international protection presented by a citizen of a third country if the latter was pregnant at the time of submitting her application, although the criteria set out in Articles 7 to 15 of that Regulation designate another Member State as responsible for that application (...)".

2CJEU, C-550/16, A, S. v. Staatssecretaris van Veiligheid en Justitie of 12 April 2018, ECLI:EU:C:2018:248, published in the electrornic Reports of the cases.

who are part of it, especially due to the number of applications for international protection presented in member countries of the EU by minors which makes the protection of their rights and respect for the family unit in a continuous evolution as also underlined by the communication of the entitled Commission: "The protection of migrant minors" of 2017[3]. The difficulties of unaccompanied minors are concentrated on the search for family members and reunification which takes longer after the pandemic crisis[4]. On the other hand, transfers that are based on the Dublin III Regulation (Garrett, Barrett, 2021) are not perfectly implementable and sometimes take many months (Hruschka, Maiani, 2022)[5]. Within this framework, the European Commission itself stated that:

"(...) the need to allocate greater efforts and resources to speed up family reunification procedures, giving priority to unaccompanied minors and separated minors and increasing cooperation between authorities responsible for their well-being in each Member State, in particular, making full use of the existing cooperation channels between the central authorities provided for by Regulation Brussels II bis[6] (now Brussels II ter) (Corneloup, Kruger,

3Communication from the Commission to the European Parliament and the Council. The protection of children in migration, COM/2017/0211 final.

4Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions EU strategy on the rights of the child, COM/2021/142 final.

5Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180, 29.6.2013, p. 31. European Council on refugees and exils (ECRE), Age Assessment in Europe: Applying European and international Legal Standards at all Stages of Age Assessment Procedures, 13 January 2023, https://ecre.org/legal-note-age-assessment-in-europe-applying-european-and-international-legal-standards-at-all-stages-of-age-assessment-procedures.

6Communication from the Commission to the European Parliament and the

2020; Musseva, 2020; Minderhood, 2021; Cassarino, Marin, 2022)[7] (...) no significant improvements appear to be found (...) in the absence of collaboration, which would instead be virtuous, between administrative authorities which, although attributable to different areas (Regulation Dublin III and Regulation Brussels II ter), operate by virtue of the same objective of protecting minors (Chèliz Inglès, 2021) (...) a sort of interoperability that can no longer be postponed"[8], to be achieved through the exchange of information of a different nature, collected in different states, which could prove to be of great use for the tracing of family members, an activity for which the European Court of Human Rights (ECtHR) itself has affirmed the obligation of states to activate all possible channels.

The condition of weakness of the holders of international protection imposes, in order to avoid a violation of Art. 8 European Convention of Human Rights (ECHR) (Villiger, 2023), not only that their requests for family reunification are treated with particular promptness and diligence, but also that facilitated procedures are provided for, aimed at allowing the recovery of the family dimension lost in due to events suffered in the country of origin or transit (…)"[9].

With regard to the burden of proof for verifying the existence of effective family ties, the related procedures by the national authorities and the information represent fundamental aspects for the effective guarantee of the rights that are provided for by the same convention as well as the difficulties of providing the relevant documentation of subjects who are often on the run[10].

Council. The protection of children in migration, COM/2017/0211 final, par. 11.

7Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), ST/8214/2019/INIT, OJ L 178, 2.7.2019.

8Extraordinary Home Affairs Council on the situation along all migratory routes and a joint way forward-Presidency Summary of 25 November 2022, p. 2: https://www.consilium.europa.eu/it/meetings/jha/2022/11/25.

9Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), op. cit.

10ECtHR, Mugenzi v. France of 10 July 2014; Senigo Longue and others v. France of 10 July 2014; Tanda-Muzinga v. France of 10 July 2014. See the conclusions of the Advocate General Bot presented in case: A, S, of 26 October 2017, ECLI:EU:C:2017:824, published in the electronic Reports of the cases, parr. 46 and 50 and of the Advocate General Wahl presented in case: C-635/17, E. v.

The relevant working document accompanying the annual report on monitoring the application of the law of the European Union of 2021 (Fenton-Glynn, 2021)[11], a document based on opinions of experts on children and the monitoring of migration on the borders of the EU are focused on the implementation of the Directive on combating trafficking and its possible amendments[12], stating:

"(...) the importance of these latest actions, also in consideration of the fact that the lack of reliable information and the long procedures for family reunification and appointment of guardians, together with the fear of being detained, sent back to the country of origin or transferred, lead minors to flee, with consequent exposure to human trafficking[13] (...) underline the lack of positive and concrete actions aimed at making the right to family unity of migrant minors effective, although a full guarantee of this right is invoked by Art. 10 of the New York Convention on the Rights of the Child of 1989, which invites states parties to consider a request for reunification from a minor or his parents with a positive spirit, humanity and diligence[14], as well as Art. 24, par. 2 Charter of the Fundamental Rights of the Europesn Union (CFREU) which requires the best interests of children in all decisions that concern them, whether made by public authorities or private institutions (...) the European Parliament has in this regard took a position underlining that measures to improve the situation of migrant children and to protect their interests at every stage of asylum procedures must be included in the EU

Staatssecretaris van Veiligheid en Justitie of 29 November 2018, ECLI:EU:C:2018:973, published in the electronic Reports of the cases.

11Commission General Statistical Overview accompanying the document Report from the Commission Monitoring the Application of European Union Law-2021 Annual Report, SWD(2022) 194 final of 15 July 2022, p. 10.

12Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15.4.2011.

13Resolution of the European Parliament of 3 May 2018 on the protection of migrant children (2018/2666(RSP)), in OJ EU C 41 of 6 February 2020, p. 41 et seq., par. c.

14This commitment was recalled by the European Parliament in the resolution of 26 November 2019 on the rights of the child adopted on the occasion of the thirtieth anniversary of the Convention on the Rights of the Child (2019/2876(RSP)), in OJ EU C 232 of 16 June 2021, p. 2, par. 37.

strategy and called on the Commission and Member States to ensure the implementation of guarantees and of procedural rights for minors in the Common European Asylum System, paying particular attention to rapid family reunification processes (…)" (Guild, 2019; Peers and others, 2021)[15].

The 2022 Migration and Asylum Report stated the need for reforms in the European asylum system:

"(…) in order to enable the Union to address both crisis situations and longer-term trends[16], reference to the opportunity to provide measures aimed at specifically impacting the family sphere of migrant minors (...) the new pact on migration and asylum, a set of proposals aimed at reforming and integrating the current common European asylum system (De Bruycker, 2020; Hailbronner, Thym, 2020)[17], whose Report, does not contain ad hoc measures in relation to such a delicate aspect, although the communications and resolutions adopted by the Commission and Parliament since 2017 indicate unity familiar as one of the fundamental rights whose effectiveness should be better guaranteed (…)" (Hailbronner, Thym, 2020).

Within this context, the preliminary rulings of the CJEU after various referrals from Belgian, Dutch and German judges involving minors to strengthen the protection of family members separated due to migratory paths, the acts of the EU in the field of immigration matters which also includes the Directive on family reunification (Guild, 2019; Bornemann, Arevalo, Klarmann, 2020)[18], the qualifications directives (Dörig, Kraft,

15Resolution of the European Parliament of 11 March 2021 on the rights of children in the light of the EU strategy on the rights of children (2021/2523 (RSP)), in OJEU C 474 of 24 November 2021, p. 146 et seq., point 24.

16Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions on the Report on Migration and Asylum, COM/2022/740 final.

17Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM/2020/609 final.

18Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, p. 12-18.

Storey, Battjes, 2020)[19] and procedures (Vedsted-Hansen, 2020)[20], as well as the Regulation Dublin III which followed a path of delineation of a more precise framework containing provisions for cases where the protection of the family unity of migrant minors is at stake. The vulnerable subjects are in accordance with Art. 7 which protects private and family life ensuring full compliance with Art. 24, par. 2 CFREU, as well as Art. 3, par. 3 TEU in relation to the objectives of the action of the Union (Blanke, Mangiamelli, 2021).

The principle of the best interests of the minor which is part of the provisions of primary and secondary law of the EU responds to the need to guarantee other international instruments such as the 1989 UN Convention on the Rights of the Child (Cantwell, 2017; Khazova, 2019; Marchegiani, 2019; Smyth, 2021)[21] which includes the CFREU Explanations (Peers and others, 2021). The Union is not a party to this convention and its internal law thus allowing Member States to respect the commitments undertaken which implement or apply the law of the Union. According to

19Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20.12.2011.

20Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29.6.2013.

21Art. 3 affirms that: "[i]n all decisions relating to children, which are the responsibility of public or private social welfare institutions, courts, administrative authorities or legislative bodies, the best interests of the child must be a primary consideration".

the UN Committee on the Rights of the Child, the principle in question does not represent a fundamental interpretative rule and a substantive right of the minor or a rule of a procedural nature[22]. This is how the right of the minor presents itself, as well as the superior interest evaluated and considered in provisions which also include interests of different types. This means that the EU recognizes a margin of discretion in its application which is conferred with primary consequence on this principle (Klaassen, Rodrigues, 2017; Lock, 2019; Moraru, Cornelisse, De Bruycker, 2020; Tiilikainen, Hiitola, Ismail, Palander, 2023).

Within this context, the preliminary rulings of the CJEU after various referrals from Belgian, Dutch and German judges involving minors to strengthen the protection of family members separated due to migratory paths. EU acts in the field of immigration matters include the Directive on family reunification (Guild, 2019; Bornemann, Arevalo, Klarmann, 2020)[23], the qualifications directives (Dörig, Kraft, Storey,

22European Asylum Support Office, Practical guide on the best interests of the child in asylum procedures, 2019, p. 13; https://www.easo.europa.eu/sites/default/files/Practical-Guide-Best-Interests-Child-EN.pdf.

23Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, p. 12-18.

Battjes, 2020)[24] and procedures (Vedsted-Hansen, 2020)[25], as well as the Regulation Dublin III. They have followed a path of delineation to a more precise framework that applies contained provisions for cases where the protection of the family unity of migrant minors is at stake.

Whenever it is necessary to make a decision affecting the minor, the decision-making process includes an assessment of the positive or negative impact of the decision on the minor in question. Thus, certain guarantees of a procedural nature are provided for by Art. 24, par. 1 CFREU (Peers and others, 2021), such as for example the listening of the minor right also provided for in national law by various countries of the EU as an element that must be taken into consideration and where the provision appears to respect the criteria and interests of the minor and other possible considerations[26] according to the core of values that are shared at a European and international level

24Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20.12.2011.

25Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29.6.2013.

26UN Committee on the protection of the rights of all migrant workers and members of their families (CMW), Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22, parr. 27-32, https://www.refworld.org/docid/5a1293a24.html.

(Lamont, 2014)[27].

The age of the minor in Directive 2003/86 and the sentences A, S, B.M.M. and XC

One of the first moments of clarification for the minor was the determination of his own age which has been qualified through many cases in the jurisprudence of the CJEU as a main stage for the assessment which represents the first premises to benefit from the more favorable rules which are contained in the acts adopted in the context of migration policies, such as a scope ratione personae which determines rules and subjects under the age of 18 and/or at an age which is lower and which legally becomes an adult in the Member State concerned[28] without, however, specifying the condition to be satisfied.

The acts in question do not refer to national law as evidence that the legislator of the EU did not:

"(...) intended to leave to the discretion of each member country the determination of the moment until which the interested party should be considered a minor. This circumstance must therefore be subject to autonomous interpretation by the Court[29] in light of the objectives of

27"(…) the child's best interests can be overridden by other factors in the decision; it is one of the several "primary" factors amongst other legitimate factors (…)".

28Regulation Dublin III, art. 4, par. 1, lett. 2; Directive 2004/83/EC, art. 2, lett. K; Directive 2013/32, art. 2, lett. I

29CJEU, joined cases C-133/19, C-136/19 and C-137/19, B.M.M. and others v. État belge of 16 July 2020, ECLI:EU:C:2020:577, not yet published, parr. 29-35. joined cases C-273/20 and C-355/20, Bundesrepublik Deutschland v. SW and others of 1st August 2022, ECLI:EU:C:2022:617, not yet published, parr. 34-39. C-279/20, Bundesrepublik Deutschland v. XC of 1st August 2022, ECLI:EU:C:2022:618, not yet published, parr. 37-42. C-768/19, Bundesrepublik Deutschland v. SE of 9 September 2021, ECLI:EU:C:2021:709, not yet published, parr. 34-38.

promoting reunification, as a necessary tool to allow family life, and of facilitating the integration of third-country nationals in the Member States, providing for strengthened protection for minors, especially unaccompanied refugees (...)"[30].

The cases submitted to the CJEU took into consideration the interpretative process of the Directive 2003/86 on family reunification which have as their object the situation of the refugee minor who requests reunification with his parent even if opposed to the parent who has obtained international protection (Biltgen, 2016; Peers, 2016; Krommendijk, 2017; Iglesias Sànchez, 2018; Arena, 2019; Jarak, 2021)[31] in a Member State and who requests to be reunited with his minor child (Guild, 2019).

The ruling A, S, concerns a third-country national who arrives in the Netherlands as an unaccompanied foreign minor and presents the relevant application for international protection as a minor which is granted upon reaching the age of majority. In

30Recital 4 and 8 of the Directive.

31See art. 3, par. 2 of the Directive. CJEU, C-380/17, K, B v. Staatssecretaris van Veiligheid en Justitie of 7 November 2018, ECLI:EU:C:2018:877, published in the electonic Reports of the cases, parr. 34-36. C-635/17, E. v. Staatssecretaris van Veiligheid en Justitie of 13 March 2019, ECLI:EU:C:2019:192, published in the electronic Reports of the cases, parr. 35-37). joined cases C-297/88 and C-197/89, Massam Dzodzi v. Belgian State of 18 October 1990, ECLI:EU:C:1990:360, I-03763. See also the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30.9.2004, p. 12ss. In particular the art. 23, par. 1 affirms that: "(…) with a view to the future establishment of a subsidiary protection status common to all Member States" (point 30). Article 23(1) of the Qualification Directive states today that "[t]he Member States shall ensure that it can be family unity is preserved". See also: Réaliser le droit au regroupement familial des réfugiés en Europe, Document thématique, June 2017, p. 27ss: https://rm.coe.int/commdh-issuepaper-2017-1-familyreunification-fr/1680727043). See also from the ECtHR the case: M.A v. Denmark of 9 July 2021, parr. 153 and 155).

particular:

"(...) the application for family reunification with parents and minor siblings, rejected as it was presented by an adult. In a context like this, the determination of the age of the refugee applicant becomes decisive in consideration of the different legislation applicable depending on whether the sponsor is a minor or an adult (…). The applicant is an unaccompanied foreign minor who has obtained the status of refugee. Art. 10, par. 3 of the Directive imposes on member countries the obligation to authorize the entry and residence for the purposes of reunification of first degree direct ascendants[32] providing for the right to authorize the entry and residence of the legal guardian or other family member, when the refugee has no direct ancestors or it is impossible to trace them. In the presence of an adult applicant, however, art. 4 establishes the obligation for states to provide for reunification with the spouse and minor unmarried children of the couple, the sponsor or the latter's spouse, a mere faculty to allow reunification with other family members such as adult children unmarried people, if they cannot provide for their own needs due to their state of health, and first-degree direct ascendants, if they do not have adequate family support in their country of origin. If the applicant is a refugee, art. 10 provides, but always on an optional basis, the possibility of authorizing the entry of other family members not provided for in art. 4, if they are the responsibility of the refugee (...)"[33].

As can be understood when we have an adult refugee, the most favorable discipline provided for by Directive 2003/86 excludes the provision of Art. 12, par. 1 relying on the applicant or his family members who are required to provide evidence that the refugee meets the relevant conditions which are established by art. 7:

"(...) accommodation considered normal for a similar family and which corresponds to the general safety and health standards in force in the Member State concerned; health insurance for himself and his family members and, finally, stable and regular resources sufficient to support himself and his family members without resorting to the social assistance system of the

32CJEU, C-230/21, X v. Belgische Staat of 22 November 2022, ECLI:EU:C:2022:887, not yet published, parr. 38, 45 and 47. C-560/20, CR and others v. Landeshauptmann von Wien of 22 June 2021 not yet discussed.

33CJEU, C-519/18, TB v. Bevándorlási és Menekültügyi Hivatal of 12 December 2019, ECLI:EU:C:2019:1070, published in the electronic Reports of the cases.

Member State concerned. In the presence of a refugee minor, however, art. 10 also directly affects the number of family members entitled to entry into the EU member country in which the minor is located, requiring the national authorities to allow reunification with the parents (...)".

Thus, in the A, S case (Gazin, 2018; Moneger, 2018; Carlier, Leboeuf, 2019), it is established that:

"(...) the minor age of a refugee applicant for the purposes of family reunification must exist at the time of presentation of the application for international protection, thus making the relevant date for determining the age of the applicant for the purposes of the subsequent procedure retroactive to the introductory moment of the first procedure (…)".

The recognition of refugee status is an act of recognition of a subjective right which, in the presence of the requirements established by the Qualification Directive, is integrated from the moment of submission of the application for international protection and the possibility of proposing the subsequent application for reunification depending on this recognition[34]. It allows us to guarantee identical and predictable treatment to all applicants who are chronologically in the same situation, ensuring, in compliance with the principles of equal treatment and legal certainty, that the legislation applicable to the application for family reunification depends mainly on circumstances attributable to the applicant and not to the administration. The right to family reunification dependents on the moment in which the competent national authority formally adopts the decision recognizing refugee status and, therefore, on the greater or lesser speed in processing the application for

34CJEU, C-279/20, Bundesrepublik Deutschland v. XC of 1st August 2022, op. cit., par. 46.

international protection (or even subsequently, from the moment the application for family reunification is submitted). This would compromise the useful effect of Art. 10, par. 3 of Directive 2003/86, since it would imply that two unaccompanied minor refugees of the same age who have submitted an application for international protection at the same time could, as regards the right to family reunification, be treated differently depending on the duration of treatment of such applications, over which they have no influence. The duration of an asylum procedure can be considerable, particularly in periods of large influx of applicants for international protection. The deadlines specifically provided for by Union law are often exceeded, making the right to family reunification dependent on the moment in which this procedure is concluded. It could deprive a substantial part of the refugees who have presented their application for international protection as unaccompanied minors of the protection according to Art. 10 of Directive 2003/86[35].

In reality, the CJEU does not hide a different interpretation and gives relevance to the moment in which the authorities decide on the application for international protection, thus putting at risk the dilatory actions by the authorities of the Member States who deal with the applications for protection presented by

35CJEU, C-550/16, A, S. v. Staatssecretaris van Veiligheid en Justitie of 12 April 2018, op. cit., parr. 51-57.

minors without the promptness that one's interest in the minor requires to ensure that these subjects reach the age of majority and to avoid the entry of their direct ascendants to the first degree[36].

The same line of orientation was also followed in the case relating to adult refugees requesting reunification with their minor children in the B.M.M. case of 2020 (Michel, 2020). In particular the CJEU stated that:

"(...) in order to determine whether the condition relating to minor age is satisfied, only the consideration of the date of presentation of the application for entry and residence for the purposes of family reunification is compliant with the purpose of the Directives to promote reunification, as well as fundamental rights protected by the legal system of the Union. In this regard, it is also irrelevant whether a ruling on this application is made directly following its submission or after a decision rejecting it has been annulled[37]. The age of the minor cannot be considered a substantial condition for the exercise of the right to reunification, like those provided in particular by Art. 7 of the Directive, but, contrary to the latter, represents a condition of admissibility of the application, which therefore can only be assessed at the time of its presentation[38] (...) the date to which reference must be made to

36CJEU, C-550/16, A, S. v. Staatssecretaris van Veiligheid en Justitie of 12 April 2018, op. cit., par. 58. joined cases C-133/19, C-136/19 and C-137/19, B.M.M. and others v. État belge of 16 July 2020, op. cit., par. 37. C-279/20, Bundesrepublik Deutschland v. XC of 1st August 2022, op., cit., par. 49. joined cases C-273/20 and C-355/20, Bundesrepublik Deutschland v. SW and others of 1st August 2022, op. cit., par. 43 and reference in the Directive 2003/86. C-768/19, Bundesrepublik Deutschland v. SE of 9 September 2021, op. cit., par. 49 and with reference of the Directive 2011/95.

37CJEU, C-279/20, Bundesrepublik Deutschland v. XC of 1st August 2022, op. cit., par. 52.

38CJEU, joined cases C-133/19, C-136/19 and C-137/19, B.M.M. and others v. État belge of 16 July 2020, op. cit., parr. 44-45 and 48: "(…) the preliminary question in fact concerned the possibility of considering that the fact that this refugee was still a minor on the date of the decision on the application for family reunification presented by the parents could be considered a "condition" whose non-fulfillment allowed the Member States to reject such an application. This possibility is excluded by the Court of Justice, according to which the age of the applicant or, depending on the case, of the sponsor cannot be considered a substantial condition for the exercise of the right to family reunification, like those provided in particular within the scope

determine whether a third-country national is minor".

This is the one in which the application for family reunification is presented by the parent, and not the one in which the competent authorities of that Member State decide on this application, possibly after an appeal against the decision rejecting the same by the administration[39].

From the statements just cited both in the A, S, and B.M.M. cases the subjects involved are different but have one element in common: the protection of the best interests of the minor, the principles of equal treatment and legal certainty, excluding that the relevant date for determining the age may be that of the decision on the reunification also considering the national administrative authorities. Both cases give value to various different moments in the identification of the minor ages where the minor's application for international protection was presented. Despite the different factual elements as well as the content of the preliminary questions, the subject requires reaching the age of majority before the recognition of international protection while this was the moment of the request for reunification, being an adult in the appeals which are brought for the annulment of the denial decisions and to the residence permit for family reunification.

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of Chapter IV of this Directive (housing, health coverage, stable resources). In fact, contrary to the latter, the age requirement represents, precisely, a mere condition of admissibility of the application for family reunification (...)".

39CJEU, joined cases C-133/19, C-136/19 and C-137/19, B.M.M. and others v. État belge of 16 July 2020, op. cit., par. 47.

Of course, the differences in the cases just exposed have found a unification in the XC of 2022 case where there are elements in common with the previous cases. The first analogy with the B.M.M. case concerns a Syrian citizen who resides in Turkey who applies for reunification with her father who is in the refugee status stage in Germany. In A, S, case the daughter was adult at the time that the recognition of international protection to the father in the presentation of the reunification application, the CJEU stated that:

"(...) does not include the reference to the date of presentation of the reunification application contained in the B.M.M. ruling, but extends the application of the A, S jurisprudence, giving greater importance to the need to promote family unity (...) than for the purpose of determining whether the child of a resident who benefits from refugee status is a minor, in a situation where such a child has become an adult before both the granting of this status to the parent and the submission of the family reunification application, the date of submission of the asylum application by the sponsor must be taken into consideration"[40].

The date on which the competent authority of the Member State concerned decides on the asylum application presented by the parent and the subsequent date on which the child submits his application for a visa for the purposes of family reunification as the one to which reference must be made to assess the status as a minor would not comply with either the objectives pursued by Directive 2003/86 or with Articles 7 and 24, par. 2 of the Charter[41]. The child of an asylum seeker can validly submit an

40CJEU, C-279/20, Bundesrepublik Deutschland v. XC of 1st August 2022, op. cit., par. 52.

41CJEU, C-279/20, Bundesrepublik Deutschland v. XC of 1st August 2022, op. cit., par. 48.

application for reunification only if the parent's application for granting refugee status has already been the subject of a definitive positive decision. The right to family reunification with the minor children cannot be jeopardized by the passage of time necessary for decisions on applications for international protection or family reunification. This would have the effect of making the right to reunification of the minor child dependent on random and unforeseeable circumstances[42].

The ruling just cited suggests that consideration has been given to the fact that it does not address the issue that does not emerge in the B.M.M. case since the child was not a minor at the time of submission of the application for reunification given that the problem of considering an earlier date, i.e. the submission of the application for international protection coming from the parent, was not taken into consideration. The interpretative solution to the question submitted to the judge distinguished between the date of submission of the application for a residence permit for family reasons and also the date of granting this provision. Not a revirement but certainly a jurisprudential evolution that occurs in the sponsor is a minor who requests reunification with his parents pursuant to Art. 10, par. 3 or an adult requesting reunification with their children pursuant to Art. 4, par. 1[43].

42CJEU, C-279/20, Bundesrepublik Deutschland v. XC of 1st August 2022, op. cit., par. 49-50.

43CJEU, C-191/22, ME v. État belge of 11 March 2021, ECLI:EU:C:2021:197, not yet published.

Presentation of the application for family reunification and minors

The jurisprudential history starting from the A, S. up to the XC ruling has contributed to strengthening the protection of the nuclear family unit which involves especially vulnerable migrants such as refugees. This does not detract from the possibility of invoking without a time limit the beneficiary elements deriving from Directive 2003/86 on the basis of the consideration that the minor is a minor at the moment the application for international protection is presented, also meeting the needs of legal certainty where the CJEU invoked his own sentences. From the A, S, case the application for family reunification by the refugee who becomes an adult during the course of the procedure for granting international protection to the sponsor is presented within the necessary time identified as three months from the day he is interested and is recognized refugee status[44].

In practice, the CJEU relied on an analogical extension based on Art. 12, par. 1, letter 3 of the Directive where Member States can ask the refugee to satisfy the material conditions that come from art. 7 when the application for family reunification is not submitted within 3 months of recognition of the status. The

44CJEU, C-550/16, A, S. v. Staatssecretaris van Veiligheid en Justitie of 12 April 2018, op. cit., par. 61. C-279/20, Bundesrepublik Deutschland v. XC of 1st August 2022, op. cit., par. 53.

rationale is that the rules which are favorable for refugees even if relating to the exemption from the possession of the required material conditions and to the determination of the moment in which they determine the minor age apply and are an active and diligent part in the presentation of the application for reunification in moment that the status and condition for the recognition of those benefits is obtained[45]. After the passage of three months from the granting of refugee status, the applicant may be deprived of the possibility of taking advantage of the favorable regime and subjected to the combined Articles 4 and 7 respectively to the admitted family members and the conditions required for exercising the right to reunification. Thus, the three-month deadline for submitting the application for reunification was confirmed in the XC ruling.

In the K, B, case of 2018 the CJEU also ruled on Art. 12, par. 1, letter. 3 of the Directive stating that:

"(...) exceeding the three-month deadline indicated therein cannot represent an element capable of affecting the validity of the application for reunification, but only an aspect that affects the determination of the applicable regime, ordinary or more favorable (…)".

Art. 5, par. 5, requires due consideration to be given to the best interests of minors when examining applications for family reunification. Art. 17 of the Directive requires compliance with the requirement of individualisation of the application (Carlier,

45According to art. 5, par. 1 of the Directive: "(…) [t]he Member States determine whether, in order to exercise the right to family reunification, the application for entry and stay must be presented to the competent authorities of the Member State concerned by the sponsor or family member or family (…)".

Leboeuf, Michel, 2019)[46]. It admits that it is up to the states to establish how to treat, from a procedural point of view, an application submitted late, provided that this occurs in compliance with the principles of equivalence and effectiveness. The states could either provide that this application will be rejected and that a new one must be submitted, which will therefore be subject to the ordinary regime[47], or that this is not necessary as the administrative authorities are called upon to directly evaluate the applicable regime depending on whether the application was submitted timely or not[48].

The possible rejection of an application that is not timely therefore does not in itself imply the non-recognition of the right to family reunification since such reunification can be granted under another regime, following an application presented for this purpose[49]. Failure to comply with the deadline referred to in Art. 12, going along with the extension of this deadline to the request for reunification and with a procedure for the recognition of international protection. The conclusions of this

46CJEU, C-380/17, K, B v. Staatssecretaris van Veiligheid en Justitie of 7 November 2018, op. cit., par. 53.

47In this case, the Court establishes that a national legislation which obliges "refugees to assert their rights within a short time after the granting of refugee status, at a time when their knowledge of the language and procedures of the host Member State may be rather low (...)", it must also provide that the persons concerned must "necessarily be fully informed of the consequences of the decision to reject their first application and of the measures they are required to adopt in order to effectively enforce their right to family reunification" (judgment K, B, cited above, par. 63).

48CJEU, C-380/17, K, B v. Staatssecretaris van Veiligheid en Justitie of 7 November 2018, op. cit., parr. 56-60.

49CJEU, C-380/17, K, B v. Staatssecretaris van Veiligheid en Justitie of 7 November 2018, op. cit., par. 61.

decision could also be extended to this last case, by virtue of the common ratio underlying the two cases. A request for reunification not presented in a timely manner would not only lead to a modification of the material conditions requested, but also a limitation of the number of family members admitted to reunification. An application presented after the deadline of three months from recognition of the status of refugee to the sponsor would mean that the minor who has in the meantime become an adult, be it the subject requesting reunification or the subject whose entry is requested for reunification, could no longer be considered as a minor for the purposes of Directive 2003/86, with consequent forfeiture of states' obligation to guarantee entry to the parent or child respectively[50].

In practice the CJEU has formulated in the K, B case, an application presented after the expiry of the three-month period and which must not deprive the resident refugee of the regime reserved for a category of subjects if the delay is objectively excusable[51]. The CJEU has shown an indeterminate path in the notion which inevitably leaves a wide discretion to the national authorities, considering that the relevant principle of the submission of the application as well as the risk of lack of uniformity in the application of the rule takes into consideration

50CJEU, C-380/17, K, B v. Staatssecretaris van Veiligheid en Justitie of 7 November 2018, op. cit., par. 62-64.

51CJEU, C-380/17, K, B v. Staatssecretaris van Veiligheid en Justitie of 7 November 2018, op. cit., par. 62.

the three-month deadline that is identified by the CJEU in the ruling A, S. Respect for the deadline derives from the maintenance of the family unit in contexts where the subjects are involved and who are minors at the time the application for international protection is presented (Inelli-Ciger, 2018). The A, S sentence presents itself as a "leading" case and within a period of three months from the day on which the refugee status was recognized to the sponsor. We have also noted these principles in the K, B, case where the objectively excusable delay in submitting the application does not lead to the consequence of removing the refugee from the most favorable regulations regarding reunification, leading the national authorities not to consider the three-year period months for submitting the application for reunification[52] by evaluating the elements in the concrete case where the useful effect of Directive 2003/86 is safeguarded guaranteeing the greatest possible protection of the relevant rights which are also contained in the CFRE[53].

52CJEU, C-550/16, A, S. v. Staatssecretaris van Veiligheid en Justitie of 12 April 2018, op. cit., par. 60.

53CJEU, C-550/16, A, S. v. Staatssecretaris van Veiligheid en Justitie of 12 April 2018, op. cit., par. 61.

Family unity and Qualification Directive: SE and LW cases

Qualifying a minor as a subject is also part of the interpretation of the Qualification Directive[54]. Let us immediately recall the SE case of 2021 relating to the case in which a father who arrives in Germany before granting subsidiary protection to his child submits an application which was rejected by the national international protection authorities when the child is still a minor (Gazin, 2021)[55]. German law based on the possibility offered by Art. 3 of the Directive to provide for more favorable provisions for determining the subjects who have the right to international protection. It is also compatible with the provisions of the same Directive which allows the parent to derive the status possessed by the minor child as a derivative. The interpretation of the notion of minor subject proves to be important given that Art. 2, letter. f) of the Directive on family reunification as well as Art. 2, letter. k) of the qualification Directive defines the minor as:

"(...) the citizen of a third country or the stateless person under the age of eighteen".

It does not specify what the relevant date is for assessing this condition. Art. 23 requires Member States, in order to preserve the family unit, to ensure that the family members of the

54Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), op. cit.

55CJEU, C-768/19, Bundesrepublik Deutschland v. SE of 9 September 2021, op. cit.

beneficiary of international protection (among whom, pursuant to Art. 2, letter j, also include the married parents of non-EU minors), who individually are not entitled to such protection, are eligible for the benefits referred to in Articles 24 to 35 of the Directive, first of all to the issuing of the residence permit (as well as access to education, the job market, social and health assistance, housing). The reference can be on the date on which the competent authority rules on the subsequent application for international protection proposed by the family member. The SE ruling establishes that, if a parent intends to derive the right to the benefits referred to in Articles 24 to 35 of the Directive, the subsidiary protection status obtained by the child or, if provided for by national legislation, the relevant date for assessing whether the beneficiary of international protection is a "minor", in order to rule on the asylum application presented by the father, is the date on which the latter submitted such an application[56].

56CJEU, C-768/19, Bundesrepublik Deutschland v. SE of 9 September 2021, op. cit., par. 42, 63-65: "the adult who is responsible for the beneficiary of international protection must not be considered a family member for an unlimited duration. The recognition of the benefits referred to in Art. 23, par. 2 or of the same international protection to a parent constitutes a derived subjective right, functional to the maintenance of the family unity of the interested parties. The protection granted to such a parent cannot, in any circumstances, cease immediately upon the party reaching the age of majority of the child benefiting from protection and cannot lead to the automatic revocation of the residence permit, which remains valid for the period initially granted in accordance with Art. 24, par. 1-2 of the Directive (three years renewable in case of recognition of refugee status; at least one year renewable for a further two in case of recognition of subsidiary protection). When defining the duration of the residence permit, Member States may take into account the fact that the beneficiary of international protection will reach the age of majority after the subjective right of his family members has arisen. In fact, the text of Art. 24 of

The jurisprudence that we have seen in the previous paragraphs analyzing and "using" Directive 2003/86 seems to place the B.M.M, SE rulings in a line of continuity, excluding the possibility of taking into consideration the date in which the national authorities rule on the family member's application for international protection. An element in communis resides in the moment in which it is relevant for the determination of the possible minor age and the application is presented enforcing the exercise of determination of the ownership of the international protection of the resident subject at the moment in which the reunification was requested.

The CJEU followed the same jurisprudential path in relation to the qualification directive and the reunification process. If the father presented an application for international protection according to the benefits deriving from Art. 23 of the Directive, at the moment in which the child obtained the derivative status, he must have already reached the age of majority, going beyond the statements of the SE case, operating on a parallel path with the XC ruling, thus considering that the data where the minor

Directive 2011/95 does not preclude differentiating the duration of validity of the residence permit of the beneficiary of such protection and that of the residence permit of his family members. According to the directive on reunification and with art. 13, Member States are required, if the application for family reunification is accepted, to issue family members with a first residence permit with a validity period of at least one year, even in the event that family reunification has been requested by the parents of a minor refugee who has in the meantime become an adult, without the fact that the child benefiting from refugee status reaching the age of majority may lead to a reduction in the duration of this residence permit". See also: joined cases C-273/20 and C-355/20, Bundesrepublik Deutschland v. SW and others of 1st August 2022, op. cit., parr. 51-52.

and not the father has applied.

Further extension of the conclusions can be seen in the XC case, that is, the decisive moment for the definition of minor age according to the application of art. 23. The provisions also envisaged by other Member States should be the one where the sponsor's application for international protection is independent of whether he is the child as in the SE case or the father as in the XC case presents himself in the case of reunification. In relation to different acts in the migratory context which involve various subjects entitled to international protection as well as the objectives inherent in the common European asylum system, the Qualification Directive is an expression that enters the scope of fundamental rights.

In the SE case the judges remained faithful and favorable at an internal level. In the former Art. 3 of the Qualification Directive it is considered Art. 2, letter. j) when requesting the family unit established in the country of origin and where the family members concerned are in the territory of the Member State. From this it follows that, in a case where the father intends to derive recognition of international protection or the benefits provided for by Art. 23 from the status of his child, not only must the right of the family member be invoked by the interested party when the child is still a minor, but it is also required that this last person requested such protection before

reaching the age of majority[57]. The reference was to the minor age at the moment in which the sponsor, and not the family member, proposes an application for international protection on an individual basis, the only condition required would remain the second. This also led to covering the opposite situation, i.e. that of the child who wishes to take advantage of the parent's status, this second condition should also be read in the opposite sense, i.e. the adult should ask for protection when the child is still a minor, even the condition of the "already established family unit of the country of origin" has already undergone an attenuation, although in relation to subjects born in EU member countries[58].

In the LW case of 2021 (Gazin, 2022)[59] a daughter of a Tunisian citizen was born in Germany by a Tunisian mother and a Syrian father, she applies for international protection of her father's refugee status. The CJEU stated that:

"(…) it does not concern the assessment of the applicant's age, as she is a minor of a few years, but rather her possibility of being considered a beneficiary of international protection. On the basis of applicable EU law, in fact, the conditions for obtaining protection neither on an original nor a derivative basis would appear to be met (...)"

the citizenship of a state considered suitable to offer adequate protection would deprive the possibility of obtaining protection

57CJEU, C-768/19, Bundesrepublik Deutschland v. SE of 9 September 2021, op. cit., par. 43.

58CJEU, C-768/19, Bundesrepublik Deutschland v. SE of 9 September 2021, op. cit., par. 44-45.

59CJEU, C-91/20, LW v. Bundesrepublik Deutschland of 9 November 2021, ECLI:EU:C:2021:898, not yet published.

on a individual on the basis of Art. 2, letter. d of the Directive (Goodwin-Gill, McAdam, 2007; Gathaway, Foster, 2014). The principle of subsidiarity of international refugee protection expressed in Art. 1, section. A, par. 2 of the Geneva Convention - and from which it appears that people who hold multiple citizenships cannot obtain refugee status if they can request protection from one of the states of which they are nationals - is in fact not referred to by the Directive. The interposed rule constituted by Art. 78 TFEU, must be interpreted in light of that treaty and furthermore, both by the combined provisions of Art. 2, letter. d) and n) and by art. 4, par. 3, letter A of the Directive, following that an applicant with the citizenship of several third countries must be considered without protection only if he cannot or, for fear of being persecuted, does not want to avail himself of the protection of any of these countries[60]. With the extension of derivative protection, by art. 2, letter j, it emerges that the obligation to provide access to the advantages referred to in Art. 23 (extended, in light of the SE ruling, to access to international protection itself) does not extend to the children of the beneficiary of international protection born in the host Member State, making the rule reference to family units already established in the country of origin[61].

60CJEU, C-91/20, LW v. Bundesrepublik Deutschland of 9 November 2021, op. cit., par. 33.

61CJEU, C-91/20, LW v. Bundesrepublik Deutschland of 9 November 2021, op. cit., par. 34.

More favorable provisions refer to the conditions that are foreseen for the recognition of protection which do not compromise the general economic nature of the Directive and the provisions which are not devoid:

"(...) of any connection with the logic of international protection (...)"[62].

They are based on what emerges from the final act of the conference of plenipotentiaries of the United Nations on the status of refugees and stateless persons. The SE ruling recognizes how this occurs in the case of automatic recognition of international protection to a family member born in a EU state in consideration of the importance of the objective represented by the preservation of family unity[63], especially in the interests of the minor[64]. What can immediately be seen from the relevant sentence is a restriction of the notion:

"(...) of a situation devoid of any connection with the logic of international protection", derived from the need to guarantee the "material and psychological support that family members can provide to each other, participating in the well-being and protection of each person[65] (...) as well as the obligation for the Member States, provided for by Art. 23, par. 1, to ensure the maintenance of the family unit of the beneficiary of international protection, further demonstrating the fact that even the interpretative activity

62CJEU, C-91/20, LW v. Bundesrepublik Deutschland of 9 November 2021, op. cit., par. 40.

63CJEU, C-91/20, LW v. Bundesrepublik Deutschland of 9 November 2021, op. cit., parr. 45, 48, 52. C-652/16, Nigyar Rauf Kaza Ahmedbekova and Rauf Emin Ogla Ahmedbekov v. Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite of 4 October 2018, ECLI:EU:C:2018:801, published in the electrornic Reports of the cases. par. 72.

64CJEU, C-652/16, Nigyar Rauf Kaza Ahmedbekova and Rauf Emin Ogla Ahmedbekov v. Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite of 4 October 2018, par. 73.

65See the conclusions of the Advocate General de la Tour presentated in the case: C-91/20, LW v. Bundesrepublik Deutschland of 12 May 2021, ECLI:EU:C:2021:384, not yet published, par. 89.

regarding the Qualification Directive has a direct impact on the protection of this fundamental right (...)"[66].

Interpretation of the Directive 2013/32 and of the Regulation Dublin III. The cases: XXXX, RO and I, S

Family unity and the protection of the child's rights are linked to Directive 2013/32 and the Regulation Dublin III. First of all we can note the possibility of rejecting as inadmissible the ex Art. 33, par. 2, letter a) of the Directive procedures, such as an application for international protection by the authorities of the state in which one of the applicant's minor daughters resides given that the interested party is found to be a beneficiary of international protection in another Member State.

Within this context we note the XXXX case of 2022 as we read about issues that have to do with the interpretation of the Procedures Directive of the jurisprudence of the CJEU and the Qualifications Directive. In particular, Art. 33 states that:

"(…) lighten the burden of examination incumbent on the competent national authorities in order to prevent any saturation of the system with the obligation, for these authorities, to process multiple applications introduced by the same applicant (Vedsted-Hansen, 2020)[67] (...) to the second Member State recipient of the new application for international protection not to proceed with the examination of the merits of the same, already assessed and accepted by the first state, the inseparable objectives of procedural economy and speed connected to the procedure directives. The strength of the rule is such that, even if the second application is motivated not by a need for international protection as such, already satisfied in the first member country,

66CJEU, C-91/20, LW v. Bundesrepublik Deutschland of 12 May 2021, op. cit., par. 90.

67See the conclusions of the Advocate General Pikamäe presented in the case C-483/20, XXXX of 30 September 2021, ECLI:EU:C:2021:780, not yet published, par. 18, 29, 33.

but by the need to preserve the family unit, the situation of the applicant is not such as to prevent the second state from declaring it inadmissible (…)".

This represents a concretization of one of the cornerstones of the common European asylum system, namely the principle of mutual trust. The different national systems being, except in exceptional circumstances[68], considered in capable of providing equivalent and effective protection of fundamental rights, which, in the case of Articles 7 and 24 CFREU (Peers and others, 2021), are not absolute in nature and may therefore be subject to restrictions under the conditions set out in Art. 52, par. 1 (Peers, Prechal, 2014; Dabrowksa-Klosińska, 2018; Lock, 2019). A combined reading of the various acts that make up the common European asylum system requires a valorisation of Art. 23, par. 2 of the Qualification Directive, which, while not providing for the extension, as a derivative, of the status of refugee or beneficiary of subsidiary protection to the family members of the holder of international protection, requires ensuring that the family unit is maintained by establishing a certain number of benefits in their favor if the three conditions listed by the Court in the SE and LW sentences of the previous year are met (which, like the present one, was pronounced by the Grand Chamber). These conditions consist in particular: (i) in the capacity of family member pursuant to Art. 2, letter j of the Qualification

68CJEU, C-483/20, XXXX of 30 September 2021, op. cit., parr. 32-33. joined cases C-297/17, C-318/17, C-319/17 and C-438/17 of 19 March 2019, Bashar Ibrahim and others v. Bundesrepublik Deutschland and Bundesrepublik Deutschland v. Taus Magamadov of 19 March 2019, ECLI:EU:C:2019:219, published in the electronic Reports of the cases, parr. 89, 90 and 101.

Directive (parent is to be considered a family member provided that he/she has been in the territory of the Member State in which the child is located and has submitted the application when the child is still a minor); (ii) in the fact of not having an individual right to international protection (taking into account the fact that the provisions of the Directive must be interpreted in light of Articles 7 and 24, paragraph 2 CFREU (Peers and others, 2021), it must be considered that a third-country national whose application is declared inadmissible in the Member State in which the minor child is a beneficiary of international protection is not individually entitled to international protection in the first Member State) and, finally, (iii) in compatibility with the legal status of the family member concerned as specified in the LW judgment (and, in this regard, the recognition of refugee status in another Member State does not, in principle, result in better treatment in another Member State than that resulting from the benefits referred to in Articles 24 to 35 of the Directive)[69].

Thus the application of Art. 33 of the Procedures Directive and the inadmissibility of the application for international protection presented by the family member enjoys protection in another Member State which are balanced by the extension of certain rights guaranteed to those entitled to protection of the Qualification Directive. Within this context we see the right to

69CJEU, C-483/20, XXXX of 30 September 2021, op. cit., parr. 39-43.

issue a residence permit, family members, beneficiaries of protection who can be authorized, the protection of family unity, to remain in their parents' country and adding with the XXXX ruling where minor children reside as refugees or beneficiaries of subsidiary protection.

Equally important we note that Art. 33 of the Directive procedure is connected with Art. 20, par 3 of Regulation Dublin III stating that:

"(...) situation of a minor who accompanies the applicant and meets the definition of family member, is inseparable from that of his family member and falls within the competence of the Member State responsible for the examination of the application for international protection of the aforementioned family member, even if the minor is not personally an applicant, provided that this is in the best interests of the minor (...) of preserving the family unity, and of its relationship with Art. 33 of the Procedures Directive was posed in relation to those cases in which a new application for international protection is presented by the parents of a minor born in the second member country following the transfer there carried out by the applicants, already holders of refugee status in another state (...)"[70].

In the RO case of 2022 the CJEU took into consideration art. 20, par. 3 which affirms that the minor's family members have the status of applicants and are not simultaneously beneficiaries of protection. The structure of the Regulation takes into consideration the situation where the minor and his family members are beneficiaries of international protection and that of a minor where the family members are simple applicants for similar protection who are not comparable but refer to different legal statuses, regulated by autonomous provisions of this

70CJEU, C-720/20, RO v. Bundesrepublik Deutschland of 1st August 2022, ECLI:EU:C:2022:603, not yet published.

Regulation[71].

Art. 20, par. 3 in relation to a minor concerned who moves to the country in which the parents enjoy the status of refugees will have the consequence of depriving the minor when the country has granted international protection to the family members in the application of the guarantees and mechanisms provided for by Regulation Dublin III. The prior recognition of international protection can deprive the minor who is the subject of the transfer decision to a suitable and specific process that cannot be activated outside the procedures for recognizing protection according to the Regulation. The exemption from starting the procedure for a minor who was born after the arrival of the applicant in the territory of the Member States which is provided for according to Art. 20, par. 3 takes into consideration that the minor is included in the procedure initiated against his family members and that this procedure is pending. Regarding the guarantees for the Member State, the possibility of adopting a decision that is relevant for the transfer and outside of any other procedure is taken into account within the three-month period provided for by Art. 21, par. 1, letter. 1) for the presentation of the request thus implying that the country has granted international protection to the family members before the birth of the minor who is faced with a similar transfer decision

71CJEU, C-720/20, RO v. Bundesrepublik Deutschland of 1st August 2022, op. cit., parr. 34-39.

without being informed and without being able to assess the competence for examining the request for international protection of the minor. This system thus establishes that Regulation Dublin prevents and minimizes secondary movements that justify a different interpretation of the rule in question.

Applications for international protection presented by family members are rejected as inadmissible and it is not possible to reject as inadmissible that of a minor who is not the minor himself but his parents who benefit from international protection from another Member State. The reasons for inadmissibility of an application for international protection according to Art. 33, par. 2 of the Procedure Directive, even if they do not derogate from the general system, can be interpreted restrictively. The judges do not underline this and none of the criteria set out in the Regulation apply so that the first Member State in which the minor presented his application is competent to examine it as is also regulated by Art. 3, par. 2. The recital 5 of the Regulation allows:

"(...) to guarantee the minor effective access to the procedures aimed at recognizing international protection, without prejudice to the objective of rapid processing of the application, as well as to attribute to his best interests the role of pre-eminent criterion, to the extent that this Member State is also the one in whose territory said minor was born and resides together with his family members, as required by Art. 6 (...)[72].

72See the conclusions of the Advocate general de la Tour in case: C-720/20, RO v. Bundesrepublik Deutschland of 24 March 2022, ECLI:EU:C:2022:219, not yet published, parr. 65-67: "(…) the best interests of the child must be a fundamental

According to the rules of the Regulation Dublin III the jurisprudence relating to the SE, LW and XXXX cases and their relatives must be authorized to remain on the territory of the new state according to Art. 23 of the Qualification Directive[73].

The CJEU, through the sentences just cited, has also dealt with the protection of the right to family unity and the right to an effective remedy protected by the CFREU (Adalto, Hofmann, Holopainen, Paunio, Pech, Sayers, Shelton, Ward, 2014; Lock, Martin, 2019; Cambien, 2021)[74]. Art. 27, par. 1 of the Regulation Dublin III allows the applicant a transfer decision which is adopted in order to allow the procedure to be established in the state according to the criteria indicated in the Regulation itself. The relevant rule does not comment on the possibility of appealing against a positive decision and according to a negative decision, the protection of minors has two aspects. Faced with the rejection of the request to take care

criterion in the implementation by the Member States of all the procedures provided for in this Regulation (…)".

73CJEU, C-720/20, RO v. Bundesrepublik Deutschland of 1st August 2022, op. cit., parr. 50-55.

74CJEU, joined cases C-133/19, C-136/19 and C-137/19, B.M.M. and others v. État belge of 16 July 2020, op. cit., par. 47, 55 and 57: "(...) the appeal presented by a minor child against the refusal of a residence permit for family reunification may be declared inadmissible for the sole reason that the minor concerned has become an adult during the judicial proceedings: in this way, he would be deprived of the possibility of obtain a ruling on your appeal against that decision and your right to an effective remedy would be compromised. In fact, "it cannot be ruled out that a third-country national whose application for family reunification has been rejected retains, even after becoming an adult, an interest in the judge hearing the appeal against this rejection ruling on the merits, as, in certain Member States, such a judicial decision is necessary in order, in particular, to enable the plaintiff to bring an action for damages against the Member State concerned (…)".

of a minor by the authorities of a Member State, a parent finds himself violating Art. 8 of the Regulation. The rejection before an adult by the authorities of a Member State in which a minor child is found in violation of Articles 9 and 10 of the Regulation offers the transfer of jurisdiction which requires the reconstruction of the family unit.

The CJEU took a position only on this matter (Klaassen, 2022; Michel, 2022)[75] and stated that:

"(...) the literal formulation of Art. 27, par. 1 of the Regulation, a reading aimed at guaranteeing the effectiveness of the fundamental rights referred to in Articles 7, 24, par. 2 and 47 CFREU necessitated by the obligation to give priority to the best interests of the minor in the implementation of the procedures envisaged by the Dublin III Regulation (art. 6, par. 1) and to apply the competence criteria contained therein respecting the hierarchy of the same (art. 7, par. 1), requires that the possibility of appealing against a decision to refuse to take charge is also recognised[76]. A different interpretation, restrictive of the scope of the appeal referred to in Art. 27, par. 1 and which excluded the possibility of an incorrect application of competence criteria being subject to judicial review, would deprive the other rights of asylum seekers enshrined in the Regulation of effectiveness. These are in particular those rights that aim to involve migrants in the procedures for determining the competent Member State: the opportunity to present information that allows the correct application of the competence criteria and that this information is taken into consideration by the competent authorities, as well as access to the summaries of the interviews carried out for this purpose[77] (...) if the protection of the family unit to which a minor belongs is at stake, cannot vary depending on whether the applicant is the recipient of a transfer or a decision by which the requested Member State rejects the request to take charge of the same applicant, since, like a transfer decision,

75CJEU, C-19/21, I, S v. Staatssecretaris van Justitie en Veiligheid of 1st August 2022, ECLI:EU:C:2022:605, not yet published.

76Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, COM/2016/0468 final-2016/0225 (COD).

77CJEU, C-63/15, Gehrdad Ghezelbash v. Staatssecretaris van Veiligheid en Justitie of 7 June 2016, ECLI:EU:C:2016:409, published in the electronic Reports of the cases, parr. 46 and 51-53.

such a refusal decision may jeopardize the minor's right to be reunited with a family member who can take care of him (…)" (Moreno-Lax, 2021).

The distinction between the cases it is included in a group of family members who are reunited within the Dublin system as a consequence of the formulation of the relevant rules. The applicant for protection and the subject of the relevant request is a minor who relies on the application of art. 8 challenging the possibility of a rejection decision which must be guaranteed at the moment in which the reunification takes place not only with the parents but also with the members of the extended family. This conclusion must be reached according to the CJEU in an interpretative manner resorting to the principle of the superior interests of the minor according to art. 8 and the principle according to pars. 1 and 2 which is aimed at family members, siblings and relatives. Within this framework, the requesting adult contests the denial decision and takes charge in order to reunite with the spouse or minor children with figures who fall within the notion of family member according to the Regulation. The unaccompanied minor applicant is understandable and protects the guarantees that allow reunification with every person who takes care given that this is not a principle of superior interest.

The CJEU states:

"(...) the Member State requested to deny taking charge and, therefore, the reunification of the subjects involved, the same needs for the protection of minors would require the analogous extension of the jurisprudence relating to Art. 27, par. 1 of the Dublin Regulation also to the case, not provided for by

the rule in question, in which the state in which the application for international protection is proposed refuses to formulate a request to take charge of thesState in which the family members, relatives or siblings are staying (Klaassen, 2022) (…). The I, S ruling represents an important position taken in view of the plausible future approval of the proposed Regulation intended to replace the Dublin III Regulation[78]. The new Art. 33, par. 1, c. 2 (replacing the current art. 27) limits the right to an effective remedy by establishing that the remedy itself must be aimed at assessing whether the transfer could entail an actual risk of inhuman or degrading treatment for the person concerned or the violation of the relevant provisions to the criteria for determining the competent Member State relating to respect for family life and the rights of the minor[79] (...) the possibility of resorting to the protection of family unity is in any case preserved. It is a source of concern that the violation of criteria other than those indicated and doubts may be expressed regarding the compatibility of such limitations with Art. 52, par. 1 CFREU (…)"[80].

The rule is silent and the possibility of appeal provides for the denial of the transfer adopted by the requested state and/or measures denying the request for taking adopted by the state. The legislator of the Union has not intervened to fill this type of gap as well as the current Art. 27, par. 1, as well as the new Art. 33, par. 1 is interpreted in light of the jurisprudence which deduces this right according to the guarantee of effectiveness of Articles 7, 24, par. 2 and 47 CFREU (Peers and others, 2021).

78Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM/2020/610 final.

79Art. 27, par. 2 of the Regulation Dublin III.

80Art. 27, par. 2 of the Regulation Dublin III.

The topics that the CJEU did not touch on and did not take into consideration

By carefully reading the sentences set out above we can understand that the relevant jurisprudence has offered a relative framework which respects the protection of the right to family unity and which involves migrant minors as holders of international protection and/or family members of such subjects from the point of view that the CJEU takes a position on. The judges of the CJEU have tried to interpret the relevant provisions of the Directive on family reunification of some of the acts that make up the common European asylum system, allowing for a reading of the provisions that could affect the effectiveness of the right to family unity of minors which takes into account not only the purposes of such acts but also the need to implement Art. 7 and 24, par. 2 CFREU (Peers and others, 2021). Reading these articles of the CFREU allow us to provide the interpretation that guarantees the limits of the concrete cases and the formulations of the preliminary questions and the broad protection of the right to family unity of migrant minors.

The CJEU decided regarding:

"(…) the identification of the relevant moment for determining the minor age for the purposes of family reunification or the extension of the benefits deriving from the granting of international protection to the sponsor (or of the same international protection on a derivative basis if provided for by domestic law), the cases in which it is possible to reject an application for international protection as inadmissible, the application of Art. 20 of the

Dublin III Regulation, the possibility of also challenging decisions rejecting the request to take charge of a minor (...) all of which are likely, if a restrictive exegesis of the rules connected to them is given, to directly affect the possibility of reconstituting family units separated due to difficult migratory paths involving particularly vulnerable individuals (…)".

Regarding this second declination (Michel, 2019)[81], the XC and SW sentences, are pronounced in a completely similar way. Art. 16, par. 1, letter. b of the Reunification Directive allows Member States to reject an application if the sponsor and his family members do not have (or no longer have) an effective marital or family bond, the assessment of the conditions necessary to consider whether real family life exists in the host country requires a case-by-case assessment based on all the relevant factors in each case, as required by Art. 17 of the Directive direct kinship alone is not sufficient to demonstrate the existence of an effective family bond, the protection needs underlying the Directive and the Charter require that it be left to the interested parties[82].

81CJEU, C-635/17, E. v. Staatssecretaris van Veiligheid en Justitie of 13 March 2019, op. cit., parr. 69 and 81: "(…) for the sole reason that the sponsor has not provided the official documents certifying the death of the biological parents of the minor, and therefore the effectiveness of her family ties with the same and that the explanation provided by the sponsor to justify her inability to produce such documents cannot be considered implausible on the simple basis of the general information available regarding the situation in the country of origin, without taking into account the concrete situation of the sponsor and the minor, as well as the specific difficulties that they have had to face, according to what they they report before and after fleeing their country of origin (…)".

82CJEU, C-768/19, Bundesrepublik Deutschland v. SE of 9 September 2021, op. cit., par. 58. joined cases C-273/20 and C-355/20, Bundesrepublik Deutschland v. SW and others of 1st August 2022, op. cit., par. 62. C-279/20, Bundesrepublik Deutschland v. XC of 1st August 2022, op. cit., par. 63. joined cases C-273/20 and C-355/20, Bundesrepublik Deutschland v. SW and others of 1st August 2022, op. cit., parr. 67-68 and 54: "(...) Art. 2, lit. j of Directive 2011/95 subordinates the concept of family member only to three conditions: (that the family nucleus is already

The right to family unity of migrant minors also takes on new pieces that allow it to be more effective. However, other open topics also remain. The interpretations provided refer to situations where the protection guarantees minors to justify not only according to their age, but also in light of the status of refugee or beneficiary of subsidiary protection that the minor himself or his family possesses. In the XC case is anticipated the moment to take into consideration the assessment of the age of a child to be reunited with the resident adult parent cannot be that of the application for reunification as a possible discrimination between minors and in the migratory experience where the application for reunification makes part. It is inevitable that what is foreseen by Directive 2003/86 imposes the most favorable needs in consideration of the vulnerability of minors and their recipients of guarantee rules in every possible scenario. The XC case is linked to the protection of minors, refugees and reverse discrimination which creates and identifies a relevant date where the resident parent has submitted the relevant application for an entry visa and residence permit.

established in the country of origin, that the family members of the beneficiary of international protection are in the same Member State in connection with the application for international protection and that the beneficiary of international protection is an unmarried minor) and the effective resumption of family life in the territory of the host Member State do not appear in these, nor in art. 23 of the qualification Directive or art. 7 Charter impose this requirement (...)".

Free movement of statutes related to international protection

The Regulation Dublin III determines the member country that is responsible for examining the application for international protection and ends up identifying the state responsible for its own protection, rooting the beneficiary's stay within the latter. The mutual trust that lies at the basis of the construction of the area of freedom, security and justice in asylum policy does not guarantee the free movement of subjects within the Union[83]. The objective is to avoid asylum shopping and the idea of making the application for international protection the sole competent state which leads to the provision for the transfer of migrants to the competent Member State (Moreno-Lax, 2012; Mellon, 2012; Brouwer, 2013)[84] and out of the inadmissibility of the application for protection when it has been granted by another member country as well as the adoption of directives that seek to harmonize the procedures for examining applications and reception conditions of migrants[85].

83CJEU, joined cases C-443/14 and C-444/14, Kreis Warendorf and Amira Osso v. Ibrahim Alo and Region Hannover of 1st March 2016, ECLI:EU:C:2016:127, published in the electronic Reports of the cases.

84CJEU, joined cases: C-411/10 and C-493/10, N.S. and M.E. of 21 December 2021, ECLI:EU:C:2011:865, I-13905. ECtHR, M.S.S. v. Belgium and Greece of 21 January 2021: "(…) reasonable reasons to believe that there are systemic deficiencies in the asylum procedure and in the reception conditions of the applicants, such as to generate the risk of inhuman or degrading treatment pursuant to art. 4 of the Charter. The prohibition sanctioned by the judgment N.S. it was reiterated, in relation to art. 3 ECHR (…)".

85The conclusions of the European Council of 9 February 2023 also contain a call for Member States to mutually recognize each other's return decisions: https://data.consilium.europa.eu/doc/document/ST-1-2023-INIT/it/pdf

The relevant legislation did not provide for the recognition by other Member States of the residence permits issued to beneficiaries of international protection. These subjects circulate in the Schengen area and within the limits of what is provided for by Regulation 2016/399 for ninety days out of one hundred and eighty[86]. Secondary movements witness a recognition of the effects of the denial of protection[87] not in a positive sense but linked to its concession (Ippolito, 2018).

In practice, Dublin and Schengen represent two coordination systems that contain criteria and allow family ties to be taken into account that have to do with determining the state responsible for the application for protection[88] and a total right of movement and residence is not granted to one state that is legally resident in a country of the area. The possibilities for ensuring greater connection between these two systems grants a full right of movement and residence to a second state that is legally resident in a country in the area. The possibilities of guaranteeing asylum and the possibility of choosing for the state to apply for protection once the status of refugee or beneficiary of subsidiary protection has been obtained allows the person to move and reside in another state thanks to the mutual

86Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), OJ L 77, 23.3.2016, 1ss.

87See art. 18, par. 1 of Dublin III.

88See the Relation n. 2019/2206(INI), par. 2.1.3: https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2019/2206(INI)&l=en

recognition of permits.

At present it does not appear to be a demonstration of failure given the project to reform the common European asylum system (Peers, 2017)[89]. This project leaves Member States with a modest space for migration and asylum which arises in 2020 and which not only intervenes on this point but introduces a new verification procedure at the border (pre-entry screening). Procedure applicable to migrants arriving at the external borders and the entry requirements following certain conditions, the

89Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ L 180, 29.6.2013. Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM/2016/0270 final-2016/0133 (COD). Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 COM/2016/0271 final-2016/0131 (COD). Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast), COM/2016/0272 final-2016/0132 (COD). Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM/2016/0465 final-2016/0222 (COD). Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, COM/2016/0468 final-2016/0225 (COD).

rapid repatriation of the migrant with the related critical issues from the point of view of guaranteeing fundamental rights. Leaving space for a system that protects the rights of migrants seems to represent a step backwards. The limitation of secondary movements remains an essential objective that prevails over the common European asylum system and does not allow the evolution that forces migrants into the state that has granted their protection.

Already the CJEU in the N.S. case stated that:

"(...) the area of freedom, security and justice and, more particularly, [the] common European asylum system, [is] founded on mutual trust and on presumption of compliance by other Member States with Union law, in particular with fundamental rights (…)" (Liakopoulos, 2019)[90].

This means that the circulation of statuses linked to international protection represents an epochal turning point from the point of view of the protection of rights without considering eliminating the roots of the problem given that the behaviors linked to secondary movements make the overall asylum system more effective[91].

90CJEU, joined cases: C-411/10 and C-493/10, N.S. and M.E. of 21 December 2021, op. cit., par. 83. Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECJ, 18 December 2014, ECLI:EU:C:2014:2454.

91In the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, An open and secure Europe: how to achieve it, COM(2014) 154 final of 11 March 2014, affirmes: "(…) it is new rules on mutual recognition of asylum decisions between Member States and a framework for the transfer of protection should be developed, in line with the Treaty objective of creating a uniform status valid throughout the Union. it would reduce barriers to intra-EU movement and facilitate the transfer of protection-related benefits from one Member State to another (...)" (p. 7).

The CJEU remaining faithful to the lines of the family unity policy in the XXXX and RO cases which are linked to the application of Art. 33, par. 2, letter. a) of the Procedure Directive stated that:

"(...) on the basis of this last provision, that the Member State may declare an application for international protection inadmissible if it has previously been granted by another Member State and, by other, at the same time, that the applicant has the right to remain in the territory of the second country where this is functional to the maintenance of family unity, in compliance with Art. 23 of the Qualification Directive, a cumbersome double passage emerges which could be considerably simplified if the statuses of beneficiaries of international protection could circulate (...) the existence of a rule such as Art. 33, par. 2, letter a is, moreover, the clear representation of a system that goes in the opposite direction (...) the coordinated reading of the two provisions is, with unchanged provisions, the only one capable of allowing the widest protection of the right to family unity of refugees, at the same time, one cannot help but hope for a system in which the procedural economy can be achieved following the disappearance of the very need to submit a new application for protection (...) the circulation of statuses represents an achievement also in other sectors of competence of the Union relating both to the area of freedom, security and justice and to European citizenship (…)" (Pfeiff, 2017; Salerno, 2019; Esteban De La Rosa, 2022).

The reference to Regulation Brussels II ter which began with Regulation 1347/2000 provided for the recognition of decisions on the termination of the marital bond regardless of the European citizenship of the parties[92]. Thus a line of jurisprudence is added where the CJEU needed to guarantee the useful effect in the provisions on European citizenship and on free movement linked to Articles 20-21 TFEU and Directive 2004/382, as well as Articles 7 and 24, par. 2 CFREU (Peers and others, 2021), i.e. the relative affirmation of the recognition of

92Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160, 30.6.2000.

family statuses that constitutes in another member country or outside the Union.

In the S.M. case which referred to in the kafalah[93], Coman regarding the recognition of marriage contracted in another member country between people of the same sex[94] and in the Pancharevo case (Tryfonidou, 2022)[95] and Obywatelskich)[96] on the cross-border recognition of same-sex double parenthood, the principle of mutual recognition is linked to European citizenship and in the hypothesis that the recognition of the status of refugee and beneficiary of subsidiary protection are arguments that can be brought to support the provision of free movement of statuses also for holders who overcome this observation in support of the provision of free movement for holders of international protection. We have seen the recognition of both the rights coming from the CFREU and that established by the legislator of the EU also in the migration field to create an effective asylum system capable of guaranteeing full protection of fundamental rights. Art. 78 TFEU (Blanke, Mangiamelli, 2021) allows us to reach a paradoxical and easier result in the matter of circulation of family statuses as a sensitive matter unlike

93CJEU, C-129/18, SM v. Entry Clearance Officer, UK Visa Section of 26 March 2019, ECLI:EU:C:2019:248, published in the electronic Reports of the cases.

94CJEU, C-673/16, Relu Adrian Coman and others v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne of 5 June 2018, ECLI:EU:C:2018:385, published in the electronic Reports of the cases.

95CJEU, C-490/20, V.M.A. v. Stolichna obshtina, rayon "Pancharevo" of 14 December 2021, ECLI:EU:C:2021:1008, not yet published.

96CJEU, C-2/21, Rzecznik Praw Obywatelskich of 24 June 2022, ECLI:EU:C:2022:502, not yet published.

migration where protection is granted on the basis of regulations and competences to the substantive right to national sovereignty. The presence of internal interference the EU has come to predict the portability of personal and family statuses. A directly applicable act such as the Brussels Regulation in all versions which makes the statuses possible and allows circulation in all national systems. The circulation of statuses linked to same-sex marriages and same-sex families, the intervention of the CJEU is fundamental for the path of new legislative interventions on the state of the union of 2020[97]. The Pancharevo ruling in the proposed Regulation of the Council relating to jurisdiction and the recognition of decisions and acceptance of public documents relating to parentage as well as the creation of a certificate of parentage[98].

Substantive competences mean that the harmonization of private international law rules represents the path in matters of family status and significant intervention. The accompanying report notes the European or foreign citizenship of the children or their parents[99]. In this intervention the European Commission did not

97https://state-of-the-union.ec.europa.eu/index_en.

98Commission Implementing Regulation (EU) 2022/695 of 2 May 2022 laying down rules for the application of Directive 2006/22/EC of the European Parliament and of the Council as regards the common formula for calculating the risk rating of transport undertakings, C/2022/2743, OJ L 129, 3.5.2022,

99Commission Implementing Regulation (EU) 2022/695 of 2 May 2022 laying down rules for the application of Directive 2006/22/EC of the European Parliament and of the Council as regards the common formula for calculating the risk rating of transport undertakings, C/2022/2743, OJ L 129, 3.5.2022.

prejudice the competence of the states in matters of family law by allowing the recognition of filiation from the way in which the child was conceived and from the type of family it comes from even when the parties involved are citizens of third countries. In the Pancharevo case and in matters of filiation, the differences between national systems can be accentuated and consolidated given the intra-EU circulation of the statuses of foreign citizens as well.

However, the same does not happen in the field of international protection where the status is granted on the basis of the common requirements which are indicated by the Qualification Directive and as regards asylum to the Geneva Convention of 1951. An approved scenario opens up to a contradictory one within the area of freedom, security and justice by assisting the portability of family statuses by attributing to a Member State the basis of national provisions third-country nationals and not to those attributed to the latter by virtue of harmonized regulations. Refugees and beneficiaries of subsidiary protection do not deviate from that provided for foreign citizens who do not enjoy freedom of movement and residence. Specific provisions containing directives on highly qualified workers[100] and on students and researchers[101], are excluded, Directive

100Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, *OJ L 155, 18.6.2009.*

101Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the

2003/109 on long-term residents[102] provides:

"(...) the achievement of the right to reside, for a period exceeding three months, in the territory of a Member State other than the one that granted this status (art. 14). The acquisition of this right following the maturation of five years of legal and uninterrupted residence in the first EU country (art. 4, par. 11) represents the only context within which third-country nationals, including refugees[103], can exercise freedom of movement and residence within the Union (...) even if the proposed amendment to Directive 2003/109 contained in the new pact on migration and asylum aims to reduce the necessary period of legal residence to three years to acquire the status of long-term resident. We are still far from the regulations envisaged for European citizens and their family members, not only due to the duration of the stay required before acquiring the right in question, but above all due to the administrative formalities and requirements provided for by the Directive and by the transposition regulations of the member countries (…). Pursuant to art. 15, par. 1, the foreigner is required to submit a new application for a residence permit in the second state aimed at verifying whether the reasons referred to in Art. 14 (mainly the exercise of a subordinate or autonomous economic activity or the attendance of study or professional training courses) (...) this provision does not represent a new permit for long-term residents, which must be requested with an additional procedure pursuant to art. 23 in the presence of the requirements described (…)"[104].

All the conditions foreseen by the Directive according to the issuance of the permit represent a due act on the part of other national administrations another status of European origin emerges cannot speak of perplexity given that Art. 79, par. 2, letter. b) TFEU in the provision based on Directive 2003/109 and adopted at the time (art. 63 TEU) represents a legal basis

purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast), OJ L 132, 21.5.2016.

102Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term resident, OJ L 16, 23.1.2004.

103Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection Text with EEA relevance, OJ L 132, 19.5.2011.

104Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection Text with EEA relevance, op. cit.

which expresses:

"(...) the definition of the rights of third-country nationals legally residing in a Member State, including the conditions governing freedom of movement and residence in other Member States (...) a simplification of procedures aimed primarily at exercising the right of residence in another Member State more easily and, ultimately, at introducing the possibility of mutual recognition of status can only represent a hope also in the context of Directive 2003/109 (...)"[105].

Art. 78 TFEU (Blanke, Mangiamelli, 2021) in relation to beneficiaries of international protection is explicit by referring to a uniform status which is valid for the entire Union. A similar solution envisaged by the Directive on long-term residents is neither sufficient nor adequate. The need to establish a procedure which will have the objective of obtaining international protection in a second Member State is not sufficient, implying a new examination of the merits of the application which does not reflect the prerogatives of a status intended to be valid in the letter of the law throughout area of freedom, security and justice. The status linked to international protection, unlike that deriving from Directive 2003/109, can allow and renew the deadline for the conditions for granting protection. The new procedure represents a procedural path that is difficult to justify in the presence of an administrative status that is not permanent.

It would be a solution for automatic recognition of the limits of the duration of the residence permit for international protection

105Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection Text with EEA relevance, op. cit.

which is accompanied by uniformity of treatment and the obligation to register with the competent authorities, borrowing from what is provided for citizens of the EU and their family members who are staying in another state for periods exceeding three months[106]. This provision, issues on the basis of the uniform model provided for by Regulation 1030/2002, simplifies the preparation of multilingual forms as provided for in the regulations issued in the sector of judicial cooperation in civil matters and, certificates on the basis of the Succession Regulation and in the proposal on filiation[107]. This does not happen to the free circulation of family statuses given that the conditions constitute a status of beneficiary of international protection which harmonizes and integrates public order at the level of the EU, representing a reason for denial of recognition which in this case will be scaled down[108].

106Art. 8, par. 1 of the Directive 2003/109.

107Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012.

108Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), ST/8214/2019/INIT, OJ L 178, 2.7.2019. Commission Implementing Regulation (EU) 2022/695 of 2 May 2022 laying down rules for the application of Directive 2006/22/EC of the European Parliament and of the Council as regards the common formula for calculating the risk rating of transport undertakings, C/2022/2743, OJ L 129, 3.5.2022.

The non-circulation of statuses in migration matters seems to respond to an ideological taboo and not to a legal impossibility. Art. 78 TFEU (Peers and others, 2021) has no direct effects and represents a complete and sufficient instrument for intervention by the legislator of the EU. The fact that refugees can enjoy advantageous treatment which respects the other resident third-country nationals of being extraneous to the law of the Union does not represent a critical element, justifying the deprivation of the possibility of choosing in which state of the EU to submit the application for protection and under which common conditions on which the protection is based. The lack of this freedom of choice and freedom of movement represents a suitable element to differentiate the position of refugees and holders of subsidiary protection from that of other third-country nationals as non-family members of Union citizens.

Concluding remarks

The family unit continues to be a subject of difficult analysis and complexity, especially with regards to the continuity of status which also represents the prerequisite for ensuring greater protection for the unity of family outside the state where international protection is recognized as happens in the XXXX and RO cases and if the status was recognized in the country where the second relevant application for international protection was presented. If the state where the holder of protection moves to reunite with his family members is required according to Art. 23 of the Qualification Directive to issue the relevant residence permit for family reasons, there is no reason why not proceed with simplified and automatic procedures on the basis of mutual recognition of the provision issued to another EU country. The CJEU and the Advocate General Pikämae have already stated that:

"(...) in order to protect fundamental rights, Member States should not be allowed to invoke "rt. 33 of the Procedures Directive if the applicant for international protection were exposed, in the event of return to the Member State which initially granted him refugee status or the benefit of subsidiary protection, to a serious risk of suffering treatment contrary to Article 7 CFREU, in combined with articles 18 and 24 of the same (...)"[109].

What exactly did the CJEU tell us? In reality he appreciated what came and admitted that the response to such situations does not translate into the reduction and degree of mutual trust according to art. 33 and in the negative form which represents

109See the conclusions of the Advocate General in case: C-483/20, XXXX of 30 September 2021, ECLI:EU:C:2021:780, not yet published, par. 33.

and translates into the need to complete a new procedure for the recognition of protection. Filling in the content of the principle in question offers states not to declare as inadmissible an application for protection that is granted to another member country but pushes them to admit that the recognition of protection grants to another member country.

The circulation of statuses is a complex issue and is always addressed with delicacy and attention given that it requires and aims to create an asylum system based on mutual trust and to be common to fundamental rights which allows for an easier opening to the recognition of statuses linked to international protection as it operates for all beneficiaries regardless of the protection needs of the family unit. This element does not represent a brake and considers the greater efficiency that derives from the functioning of the Dublin system and which is linked to the roots of the reasons that protection seekers consider as secondary movements. This is not a brake given that the idea extends to foreign citizens with a right where movement and residence for periods exceeding three months is linked to European citizenship. The progressive extension to citizens of third countries and other rights deriving from the status of citizens of the EU are linked to the duration of the permit and continuation of the justified conditions without considering, however, the recognition of protection.

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